SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 553

THE UNITED STATES, PETITIONER,

vs.

ALFRED C. BERGH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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1 In the United States Court of Claims

No. 269-52

ALFRED C. BERGH, JOE FRANK BRYSON, JAMES A. CATES, HARRY J. NOVOTNEY, JR., GLENN VOCKRODT, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

PETITION—Filed May 28, 1952

To the Honorable, The Court of Claims:

1. At all times material hereto the plaintiffs were and now are citizens of the United States of America.

2. During all or part of the period from January 1, 1945, to December 1, 1945, the plaintiff, Alfred C. Bergh, was regularly employed as a leading-man, electric welder, in the Norfolk Navy Shipyard, Norfolk, Virginia; the plaintiff, Joe Frank Bryson, was regularly employed as a machinist in the Charleston Naval Shipyard, Naval Base, South Carolina; the plaintiff, James A. Cates, was regularly employed as a machinist in the Norfolk Naval Shipyard, Norfolk, Virginia; the plaintiff, Harry J. Novotney, Jr., was regularly employed as an electrician in the Puget Sound
2 Naval Shipyard, Puget Sound, Washington; and the plaintiff, Glenn Vockrodt, was regularly employed as an electrical trainee instructor in the Puget Sound Naval Shipyard, Puget Sound, Washington.

3. Plaintiffs, as civilian employees of the Naval Department, had their compensation fixed by the Wage Board of Review of the Navy Department in accordance with the provisions of the Act of July 16, 1862, 12 Stat. 587, 34 U.S.C. Section 505.

4. The plaintiff, Alfred C. Bergh, entered the military service of the United States on August 12, 1946, and was honorably discharged February 5, 1948. The plaintiff, Joe Frank Bryson, entered the military service of the United States on October 6, 1950, and was honorably discharged January 15, 1952. The plaintiff, James A. Cates, entered the military service of the United States on September 16, 1946, and was honorably discharged February 27, 1948. The plaintiff, Harry J. Novotney, Jr., entered the military service of the United States on November 8, 1945, and was honorably discharged on August 5, 1946. The plaintiff, Glenn Vockrodt, entered the military service of the United States on September 3, 1946, and was honorably discharged September 30, 1947.

5. In accordance with the Act of January 6, 1885, 23 Stat. 516, 5 U.S.C., Section 86, the Act of May 13, 1938, 52 Stat. 351, 5 U.S.C. Section 87(a), the Act of June 29, 1938, 52 Stat. 1246, 5 U.S.C., Section 86(a); and the Act of December 26, 1941, 55 Stat. 862, 5 U.S.C., Section 87(b), plaintiffs at all times material hereto were entitled to the following holidays with full pay when prevented or relieved from working solely because of the occurrence of these holidays: New Year's Day, Fourth of July, Labor Day, Armistice Day, Thanksgiving Day, Christmas Day and Inauguration Day. In addition, plaintiffs were entitled to full pay whenever relieved or prevented from working on any
3 day declared a holiday by Federal Statute or Executive Order and on any day on which the Departments and establishments of the Government were closed by Executive Order.

6. During the period from January 1, 1945 to December 1, 1945, plaintiffs were regularly required to and did work on the following holidays, or some of them, all of which were holidays on which plaintiffs were entitled to be released from work with an ordinary day's pay in accordance with the statutes set forth in paragraph five of this petition:

January 1, 1945	New Year's Day
January 20, 1945	Inauguration Day
February 22, 1945	Washington's Birthday
May 30, 1945	Memorial Day
July 4, 1945	Fourth of July
September 3, 1945	Labor Day
November 11, 1945	Armistice Day
November 22, 1945	Thanksgiving Day

7. For work performed on the aforementioned holidays, plaintiffs received only the same rate of pay as for work performed on ordinary work days. They did not receive the additional compensation required by the statutes set out in paragraph five of this petition. Plaintiffs claim additional compensation in accordance with said statutes.

8. Each of the plaintiffs herein has submitted a claim for holiday compensation to the Comptroller General requesting that he be allowed additional compensation for having performed work on holidays during the period set out in this petition in accordance with the said statutory provisions.

9. In accordance with Release of February 11, 1952, Comptroller General of the United States, B-102974, B-102973, B-102897, in which the Comptroller General determined that claims based solely upon the statutes set out in paragraph five in the
4 instance where work was actually performed would be routinely denied, such denials have been issued or will be

issued to all of the plaintiffs herein. Plaintiffs state further upon information and belief that the great majority of such claims have been or are being denied routinely without the assignment of a Claim Number. Settlement Certificate, General Accounting Office, under date of March 28, 1952, without a Claim Number, denying his claim, was sent to the plaintiff, Alfred C. Bergh, a copy of which is attached hereto and made a part hereof as Exhibit No. 1. Other Settlement Certificates of a like nature have been or will be routinely sent to the other plaintiffs.

10. Each of the above-named plaintiffs claims and seeks judgment for $50.00 more or less representing compensation due him for work performed on holidays during the period set out in this petition. The amount of each claim will be subject to exact computation from the records of the Comptroller General prior to entry of judgments herein.

11. No other action has been taken on these claims in Congress or by any of the Departments; no persons other than the plaintiffs are interested therein; no assignments or transfers of these claims or any part thereof or interest therein have been made. The plaintiffs are justly entitled to the amounts as herein claimed from the United States after allowing all just credits and offsets.

5 *Wherefore*, each of the above-named plaintiffs prays judgment against the United States in the amount of $50.00 more or less subject to exact computation as aforesaid.

HERBERT S. THATCHER,
736 Bowen Building,
Washington 5, D. C.
Attorney for Plaintiffs.

WOLL, GLENN & THATCHER
736 Bowen Building
Washington 5, D. C.
J. ALBERT WOLL
JAMES A. GLENN
JOSEPH E. FINLEY

Of Counsel

6 EXHIBIT NO. 1 TO PETITION

SETTLEMENT CERTIFICATE

General Accounting Office
Washington 25, D. C.

March 28, 1952

IN CORRESPONDENCE
PLEASE REFER TO:
DIVISION: CLAIMS
CLAIM NO.: ———

Mr. Alfred C. Bergh,
27 Gay Avenue
Portsmouth, Virginia.

Sir:

Your claim for additional compensation alleged to be due incident to services rendered on various holidays as an employee of the Department of the Navy has been carefully examined and it is found that no part thereof may be allowed for the reasons hereinafter stated.

The Supreme Court of the United States on January 2, 1952, U. S. Sup. Ct. No. 209, in affirming the decision of the United States Court of Claims in the case of *John Stuart Kelly, et al.* v. *United States*, decided April 3, 1951, 119 C. Cls. 197, 96 F. Supp. 611, predicated its finding that the petitioner was entitled to recover additional compensation for services rendered on certain holidays upon the basis of a "wage agreement" negotiated by the Public Printer and a committee of employees representing journeymen printers of the Government Printing Office the pertinent provisions of which agreement authorized payment of premium and gratuity pay for services rendered on legal holidays
7-8 and special holidays declared by Executive order.

The Department by which you were employed has reported that during the period of your claim there was no "agreement" in effect granting to employees of your class premium and gratuity pay for work performed on holidays.

I therefore certify that no balance is found due you from the United States.

Respectfully,

LINDSEY C. WARREN
Comptroller General
of the United States.
By: W. F. HAMET.

9 In the United States Court of Claims

[Title omitted]

DEFENDANT'S ANSWER—Filed Nov. 28, 1952

Defendant, for its answer to the petition filed herein:

1. Admits the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2.

3. Admits that plaintiffs, as civilian employees of the Navy Department, had their compensation fixed by the Navy Department in accordance with the provisions of the Act of July 16, 1862, 12 Stat. 587, 34 U.S.C. Section 505. The remaining allegations contained in paragraph 3 are denied.

10 4. Admits the allegations contained in paragraph 4.

5. Admits the allegations contained in paragraph 5 except the allegations that plaintiffs were entitled to full pay when prevented or relieved from working on Inauguration Day, which allegation is denied.

6. Admits that during the period from January 1, 1945, to December 1, 1945, plaintiffs were required to and did work on some of the days listed in paragraph 6. The remaining allegations of that paragraph are denied.

7. Admits that for work performed on the days listed in paragraph 6 of the petition the plaintiffs received the same rate of pay as for work performed on ordinary work days. The remaining allegations contained in paragraph 7 are denied.

8. Admits that plaintiffs Alfred C. Bergh, Harry J. Novotney, Jr., and Glenn Vockrodt submitted to the Comptroller General claims for additional compensation for having performed work on holidays during the period set forth in the petition. The remaining allegations contained in paragraph 8 are denied.

9. Admits that the claims of plaintiffs Alfred C. Bergh, Harry J. Novotney, Jr. and Glenn Vockrodt have been denied by the Comptroller General and that Exhibit No. 1 to the petition
11-12 is a true copy of the Settlement Certificate sent to plaintiff Alfred C. Bergh. The remaining allegations contained in paragraph 9 are denied.

10. Paragraph 10 of the petition, being a mere statement of claim, does not appear to require answer.

11. Denies knowledge or information sufficient to form a belief with respect to the allegations contained in paragraph 11, save the allegation that plaintiffs are entitled to recovery, which allegation is denied.

WHEREFORE, defendant prays that the petition be dismissed with costs assessed against plaintiffs.

HOLMES BALDRIDGE,
Assistant Attorney General.

GILBERT E. ANDREWS
Attorney for Defendant

13-35 In the United States Court of Claims

[Title omitted]

STIPULATION OF FACTS—Filed January 19, 1955

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the facts hereinafter set forth, shall be deemed to have been proved by competent evidence and shall constitute a part of the record in this case; provided that either party may object to any facts hereinafter stipulated and agreed to on the grounds of irrelevancy and immateriality; and provided further that either party may hereafter adduce material evidence in connection with the matters stipulated herein.

The basic questions of law and fact involved in this action appear to be common to all of the plaintiffs in this action. The facts hereinafter set forth are only those relevant to the claim of plaintiff Alfred C. Bergh. Upon the determination of the questions of law in the case of Bergh, the right of all other plaintiffs involving identical questions of law shall be thereby resolved. In the event of a decision that Bergh is entitled to recovery, the amount of his damages and of each of the other plaintiffs having identical claims shall be computed from the records of the Department of the Navy.

36 DEFENDANT'S EXHIBIT No. 1

COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON 25

B-53383 Nov. 29, 1945.

The Honorable,
The Secretary of War.

MY DEAR MR. SECRETARY:

There has been considered your letter of October 17, 1945, as follows:

> "Application of the Federal Employees Pay Act of 1945 to persons falling within its scope has created certain prob-

lems in this Department which are in need of solution at the earliest possible time. These problems arise primarily from the dual system of wage administration that exists in the Federal service. The Federal Employees Pay Act typifies this duality since, under present conditions, it is applicable to roughly fifty per cent of total Federal employment while the remaining groups are covered by a miscellany of other statutes and administrative practices. To a very great extent, the recent law extended to employees subject to the Classification Act of 1923, as amended, provisions very similar to those previously in effect for wage board employees with respect to pay and overtime computation, night differential payments, and regular hours of work.

"In connection with the observance of holidays, however, questions have been raised as to whether wage board employees who are required to work on such days may be compensated at the penalty rate of time and one-half. On the most recent occasion when this question arose, Labor Day of this year, the Department advised its field appointing officers that no authority existed for payment of other than straight time rates for work performance on that day, despite the fact that basic wages would have been payable under the act of June 29, 1938 (52 Stat. 1246), even if no work had been performed. The work so performed would therefore be without additional compensation, a situation which existed for all employees during
37 the war period. With passage of Section 302 of the Federal Employees Pay Act of 1945, however, continuance of that practice for wage board employees while paying penalty rates to the salaried group is highly discriminatory.

"Upon giving further thought to this question, however, we are inclined to believe that our original decision against payment of penalty rates for holiday work may have been in error insofar as legal authority is concerned. This view is based on the fact that there is no law currently in effect which treats the general subject of wage administration for employees not subject to the Classification Act of 1923, as amended, and that, in the absence of such statutory directive, it is incumbent upon the Department to provide appropriate administrative regulations. These regulations must, of course, be consistent with such statutes or Executive Orders as may exist for certain limited areas in this field but otherwise the Department is free to fill in the gaps. Before taking any steps to implement this conclusion, however, it is considered desirable to secure your concurrence both as to the general proposition and the immediate question of holiday pay.

"As you are well aware, the Congress has refrained from enacting any comprehensive wage system for positions falling in

the general category of trades, crafts and laboring occupations. Certain agencies of the Government, notably the Navy Department under the act of July 16, 1862 (12 Stat. 587), are under legislative mandate to fix hours of labor and rates of pay to conform as closely as the public interest will permit with those prevailing in private establishments in the immedate area of their installations. This Department is not now governed by a statute of this type but we have long recognized the desirability of adopting the 'prevailing rate' criterion as the core of our wage-fixing system. Since very early in the present century, determination of what constituted 'prevailing rates' has been a function of wage boards in our larger installations and of the chiefs of bureaus, arms, and services as an administrative duty for other stations. With the advent of the national wage stabilization policy under Executive Order No. 9250, October 3, 1942, it was necessary to create a central Wage Administration Agency in the Department to
38 exercise a central control over wage-fixing in field installations through approval of local survey findings. This agency developed a uniform wage policy for the Department which had as its basis compliance with statutes and War Labor Board rulings and adoption of progressive industrial wage practices. Under the latter category may be included the Agency's authorization of night differential payments in areas where that practice prevailed in competing industries. That element of the Department's wage program was recognized in your decision of July 20, 1944 (24 Comp. Gen. 39).

"It is emphasized that all of the above matters were purely administrative and that, in the absence of recognition for them, the Department could not have made payments over the many years that the practices have been followed. On two occasions the Congress has established mandatory standards to govern wage payments to employees not otherwise subject to statutory rates. Section 23 of the act approved March 28, 1934 (48 Stat. 509), placed a floor under their wage rates by providing that the weekly compensation set by wage boards or similar wage fixing authority should not be less than the full time weekly earnings under the wage schedules in effect on June 1, 1932. The same statute established a forty-hour week as the regular hours of labor for such employees and prescribed that penalty pay of *not less than* time and one-half should be paid for overtime work in excess of those hours. The act approved June 29, 1938 (52 Stat. 1246), established as public policy that daily, hourly, and piecework employees should be placed on a parity with annual salaried groups with respect to compensation for holidays on which no work is performed. Both of these statutes are directive in character, that is, they establish definite standards

within a limited area which the Department is required to meet. Neither they nor any other applicable statutes prohibit the Department from exceeding those standards so long as compensation is fixed uniformly for all employees similarly situated and actual services are rendered in connection with a purpose for which appropriations are made in compliance with Section 4 of the act approved August 5, 1882 (22 Stat. 255), as amended (see 5 U.S.C. 46).

"We are not unmindful of the decision rendered to this Department by Acting Comptroller Elliott in 18 Comp. Gen. 186 to the effect that only straight time rates were payable for holidays. However, it appears abundantly clear that circumstances have changed radically since that time and that the Department's adoption of a uniform wage system having as its aim the adoption of rates of pay, hours of work, and general conditions of employment which are in conformance with those of private industry requires and justifies reexamination of the statutes involved. With specific reference to the matter of holiday pay, for example, the general practice of private industry is evidenced by the fact that it was necessary to limit the number of holidays on which double time penalty pay might be authorized during the war period (see Executive Order No. 9240, recently revoked by Executive Order No. 9601). In addition, the Congress has now authorized penalty pay for holiday work performed by salaried Federal workers in a law which had as one of its avowed purposes equalization of pay and working conditions for all employees.

"It is believed that you will contribute greatly to sound wage administration in the Federal service generally by furnishing advice on the following general principle and its pertinent corollary:

"(a) As a basic maxim in fixing wages for those not subject to statutory schedules, is it required that Departments and agencies have specific statutory authority for each element of a wage program, such as overtime compensation, night differential payments, and holiday pay? It is to be understood, of course, that such provisions would not be inconsistent with existing statutes, orders, or decisions fixing definite minima or maxima in any specific area covered by statute and that general industrial practice would be used as a guide.

"(b) Would you be required to object to a change in existing regulations of this Department which would authorize payment of time and one-half the basic rate for work performed on a holiday? If penalty rates for such work are proper at all, may they exceed time and one-half as appears to be the general industrial practice."

39

Section 23 of the Independent Offices Appropriation Act,
40 1935, approved March 28, 1934, 48 Stat. 522, provides as follows:

> "Sec. 23. The weekly compensation, minus any general percentage reduction which may be prescribed by act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: *Provided*, That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one-half."

The said Section 23—generally referred to as the 40-hour week statute of 1934—expressly requires that the weekly compensation of employees coming within the purview thereof shall be reestablished and maintained "at rates not lower than necessary" to restore the full weekly earnings of such employees to their earnings under the wage schedules in effect on June 1, 1932; that the regular hours of labor "shall not be more than forty per week"; and that overtime shall be compensated for at a rate "not less than" time and one-half. While the functions of "wage boards or other wage-fixing authorities" mentioned in the said statute are to adjust, from time to time, the compensation of employees in the several trades and occupations to conform with the prevailing wage scale in effect for similar classes of employees in commercial industry, it is clear that with respect to the rates of regular compensation and overtime compensation the said Section 23 prescribes *minimum* requirements that must be met. That is to say, while, generally, the rates of regular and overtime compensation of employees of the Government within the purview of the said section are to be fixed in conformity with the rates in effect in commercial industry for similar employees, nevertheless, the minimum rates prescribed by Section 23 must be maintained even though the rates for similar employment in industry should be fixed at a lower level. Conversely, since
41 Section 23 fixes *minimum* rates, only, for regular and overtime compensation, it is evident that the rates of such compensation may be increased to accord with commercial standards. Likewise, it seems clear that wage boards or other wage-fixing authorities, in the exercise of their normal functions, may authorize night differential payments or other elements of a wage program—not otherwise in contravention of law or established rule applicable to Federal personnel—to conform with commercial practices generally, without first obtaining specific statutory authorization therefor. Sec. 24 Comp. Gen. 39; *id.* 676.

With respect to the authority of wage boards to authorize holiday pay for employees within the 40-hour week statute, that is, payment of "penalty rates" for work performed by such employees on holidays, it may be stated that the decisions of this office uniformly have held that, under the express provisions of the said Section 23, such employees, if required to work on a holiday falling within their regular tours of duty, are entitled to regular compensation, only, for that day. See 18 Comp. Gen. 186, 191, 673; 21 *id.* 217. That determination is based upon the specific provisions in Section 23 that the regular hours of labor shall not be more than forty per week and that "overtime" shall be compensated for at a rate not less than time and one-half. Stated in other words, since the said statute prescribes the "regular" hours of labor per week to be not more than forty, the settled construction thereof has been that a 40-hour week employee is not entitled to overtime compensation unless and until he shall have completed his regular tour of duty. The provision in the said statute that regular hours of labor per week shall not be more than forty consistently has been recognized as changing the hours of regular work of the employees affected thereby from a daily to a weekly basis with every day of the week —including Sundays and holidays—being regarded the same when within the regular tour of 40 hours. 13 Comp. Gen. 295, 444. Consequently, since, by its very terms, the 40-hour week statute
42 precludes payment of other than regular compensation for work performed by employees covered thereby on holidays falling within their regular tour of duty, it follows that, in the absence of specific statutory authority therefor, wage boards properly may not authorize the payment of "penalty rates" for work performed on such days.

It is realized that the provisions of Section 302 of the Federal Employees Pay Act of 1945, 59 Stat. 298, authorizing payment of compensation at the rate of one and one-half times the regular basic rate of compensation to employees covered by that *act* for work required on a holiday create an inequitable situation with respect to 40-hour week employees who, also, are required to work on holidays within their regular tour of duty. However, the fact that statutory authority now exists to pay per annum employees additional compensation for holiday work does not warrant the conclusion by this office that employees affected by the 40-hour week statute similarly should be so compensated. On the contrary, since prior to the enactment of the said Federal Employees Pay Act of 1945, per annum employees as well as 40-hour week employees were denied other than regular compensation for work on a holiday falling within their tours of duty, it would appear clear that before additional holiday pay may be paid the latter class of employees statutory authority therefor must be provided as was done in the case of per

annum employees. Of course, employees under the 40-hour week law who perform work on holidays falling outside their regular tour of duty and in excess of their regular hours of labor are entitled to overtime compensation at a rate not less than time and one-half as expressly provided by the said Section 23. Also, such 40-hour week employees who come within the purview of the holiday pay statute of June 29, 1938, 52 Stat. 1246, are entitled to payment of their regular compensation for Federal holidays and days on which the Government departments and establishments are closed by Executive order, if they are prevented from working on such days "solely because of the occurrence of a holiday."

43 In the light of the foregoing, question (a) is answered by saying that wage boards may alter the rates of regular compensation and overtime compensation for 40-hour week employees—not below the minimum rates prescribed by the 40-hour week statute—and may authorize night differential payments or other wage program changes, not specifically governed by statute, to accord with commercial practices regarding similar employees, without the necessity of first obtaining express statutory authority therefor, but that, in the absence of legislation to that effect, they properly may not authorize the payment of compensation for holiday work on any basis other than that prescribed by the said 40-hour week statute.

Assuming that question (b) has reference to work on a holiday falling within an employee's regular tour of duty, the question contained in the first sentence thereof is answered in the affirmative, rendering it unnecessary to answer the question presented in the last sentence.

Respectfully,

(Signed) FRANK L. YATES,
Acting Comptroller General of the United States.

44 ARGUMENT AND SUBMISSION OF CASE

On June 9, 1955, the case was argued and submitted on the merits by Mr. Herbert S. Thatcher for the plaintiffs, and by Mr. Walter Kiechel, Jr. for the defendant.

45 In the United States Court of Claims

No. 269-52

ALFRED C. BERGH, ET AL.

v.

THE UNITED STATES

Mr. Herbert S. Thatcher for the plaintiffs. *Mr. J. Albert Woll, Mr. James A. Glenn,* and *Mr. Joseph E. Finley* were on the briefs.

Mr. Walter Kiechel, Jr., with whom was *Mr. Assistant Attorney General Warren E. Burger,* for the defendant. *Mr. Gilbert E. Andrews,* and *Mr. Thomas Hogan* were on the briefs.

OPINION—July 12, 1955

LARAMORE, *Judge,* delivered the opinion of the court:

Alfred C. Bergh, one of the plaintiffs herein, is suing to recover extra pay which he alleges is due him for labor performed on certain legal holidays during the year 1945.[1]

At all times material herein, plaintiff Bergh was regularly employed as a leading man, electric welder, in the Norfolk Naval Shipyard, Portsmouth, Virginia, and as a per diem civilian employee of the Navy Department. During the year 1945, plaintiff Bergh worked on four holidays for which he was paid his regular per diem wage at straight time. For any work performed on those days in excess of eight hours he received overtime pay.

In furtherance of the prosecution of the war, on October 29, 1942, the Secretary of the Navy issued a directive providing for wartime holiday work by Navy employees. On August 17, 1943, in accordance with a directive of the President issued on May 12, 1943, the Secretary of the Navy issued a further directive which stated in pertinent part, as follows:

46 * * * necessity for maintaining maximum output in government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should, with exception of Christmas be considered as regular work days for the duration of the war * * *.

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[1] The case is presented upon a Stipulation of Facts. It has been agreed by counsel for plaintiffs and defendant that the decision of this court, based upon the Stipulation of Facts, will resolve the questions of law in the case of Bergh and four other plaintiffs similarly situated. The basic questions of law and fact are common to all of the plaintiffs in this action.

Plaintiff Bergh was subject to these directives. It was only to the extent of these directives that the plaintiff was required to work on four holidays during 1945. Plaintiff Bergh did not request the Department of the Navy to excuse him from work on these holidays.

On August 23, 1945, the normal observance of holidays (by the suspension of activities in the departments) was restored by White House memorandum. Accordingly, plaintiff Bergh did not work on three remaining holidays occurring in 1945. Nevertheless, he was paid his regular per diem wage on those days.

On March 10, 1952, Bergh submitted a claim to the Comptroller General of the United States for additional compensation for work performed on the four holidays occurring in 1945; namely, New Year's Day (January 1, 1945), Washington's Birthday (February 22, 1945), Memorial Day (May 30, 1945), and the Fourth of July (July 4, 1945). On March 28, 1952, the Comptroller General issued a Settlement Certificate in which he disallowed plaintiff Bergh's claim and certified that no balance was due him from the United States. Thereafter, plaintiff Bergh filed a petition in this court seeking a judgment against the United States for so-called "holiday gratuity pay."

The questions presented are: (1) whether the joint resolution of 1885 [2] established a mandatory benefit for Federal per diem employees and (2) if so, did the joint resolution of 1938 [3] operate to repeal the prior congressional enactment.

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[2] "The employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the government, on duty in Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The 1st day of January, the 22nd day of February, the day of each year which is celebrated as "Memorial" or "Decoration Day," the 4th day of July, the 25th day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days" (No. 5, 23 Stat. 516, as amended by the Joint Resolution of February 23, 1887, No. 6, 24 Stat. 644, 5 U. S. C. § 86).

[3] "Whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day or any other day declared a holiday by Federal statute or Executive Order, or any other day on which the de-

47 We believe that the issue in this case was considered and disposed of by the majority opinion of this court in *Kelly* v. *United States*, 119 C. Cls. 197. In that case, one John Stuart Kelly, an hourly rated employee in the Government Printing Office, made the same claim for gratuity pay for holiday work as is being made by plaintiff Bergh, *i. e.*, a claim for an extra day's pay, in addition to his regular pay, for each holiday on which he was required to work and which fell on a regular work day. Kelly, however, predicated his claim not only on existing statutes and administrative practice, as does Bergh, but also, since he was an employee of the Government Printing Office, on certain provisions of the collective bargaining agreement in effect between the Government Printing Office and the Union representing the Government Printing Office employees. There is no such agreement covering Bergh's employment with the Navy Department, so Bergh makes no claim based on a contract theory.

The majority of this court upheld the Kelly claim, both on the theory of statutory right to gratuity pay and on the theory of contract right. The majority opinion specifically held in respect to the claim based on statutory right that the 1938 Resolution did not operate to repeal previously enacted statutory grants of gratuity pay but rather was designed (1) to give the same status, for gratuity pay purposes, to holidays established by Executive Order as to holidays established by statute, and (2) to eliminate a situation under which wage-rate employees, although not called to work, received gratuity pay on holidays which fell on a day, such as a Sunday, when the employee would not have worked in any event. The Government appealed the *Kelly* case to the United States Supreme Court, which Court on January 2, 1952,[4] affirmed, but did so solely on the ground that the collective agreement covering

48 Government Printing Office employees, by its express terms, required the payment of the gratuity pay claimed by Kelly. That Court expressed no opinion on the effect of the 1938 Joint Resolution as repealing prior enactments granting gratuity pay, although the Court did note that "the Resolution was silent on the subject of gratuity pay for holidays on which work was performed."

Defendant in its brief admits that the issue of compensation for

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partments and establishments of the Government are closed by Executive Order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

"Sec. 2. The Joint resolution of January 6, 1885, U. S. C., title 5, sec. 86, and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict" (c. 818, 52 Stat. 1246, 5 U. S. C. § 86a).

[4] *United States* v. *Kelly*, 342 U. S. 193.

loss of income occasioned by the closing of the establishment on a holiday was disposed of by the Joint Resolution of January 6, 1885, *supra*, as amended, but says the second problem, whether an employee required to work on a holiday should be granted additional compensation was not even considered. This brings us to the exact situation in the *Kelly* case, *supra*, wherein the court held that the Act of 1938 did not deny to the plaintiff his right to holiday pay in addition to the pay earned by him when he worked on holidays. To hold otherwise would lead to the conclusion that Congress by the 1938 Resolution intended to put the Government in an unfavorable position competitively at a time when the Government was in need of many new employees for the purpose of national defense. It would also lead to the absurd situation wherein if a per diem employee were required to work on a holiday, he would be paid no more than his fellow worker who was not required to work. Similarly, if a per diem employee were required to work two hours on a statutory holiday, he would be paid for only two hours of labor and would receive less pay than if he were not required to work at all.

As was said in *Kelly* v. *United States, supra* (P. 208):[5]

> One has immediate doubts as to whether Congress, in 1938, intended to take away from this class of Government employees these rights which they had enjoyed at least since 1895. And when one examines the origin and purpose of the legislation, he finds not the remotest intimation of any such intent. The resolution as originally introduced provided merely that per diem employees should be paid for the December 24, 1937, special holiday. It was amended so that it would serve as permanent legislation for all such occasions. The Civil Service Commission and the House Committee in enlarging the scope
> 49 of the resolution obviously had noted the Comptroller General's comment, quoted in the committee report, that the existing legislation had been so interpreted as to give employees pay for a holiday coming on a day when they would not have worked anyway. To prevent that unduly generous treatment, the language "whenever * * * employees * * * are relieved or prevented from working solely because of the occurrence of a holiday" was inserted. The words were apt for that purpose. Hence we are not asked by the plaintiffs to disregard, or nullify, words of a statute on the ground that Congress used them inadvertently. They had a purpose and were,

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[5] It was stipulated in the *Kelly* case that beginning with the Act of 1895 Government Printing Office employees were paid for these holidays whether the holidays fell on what would otherwise have been a work day or not.

for that purpose well chosen. We are asked only to hold that they should not be given an additional application, which, taken literally, they could receive, when all the indications are that they were not meant to have it.

* * * * *

This being the situation, we think that the administrative officers of the Government and the courts have no duty, and indeed no right, to attribute to Congress an intention which, it is morally certain, Congress did not have, by giving to words which Congress used for one obvious purpose, an additional application which, taken literally, they might support. The evil which Congress meant to cure by the words it used, it cured. The additional effect contended for by the Government would destroy a practice which no one had ever even intimated to be an evil, and which responsible officials had, for more than forty years regarded as just and necessary.

We can find no inconsistency between the 1885 Resolution and the 1938 Resolution. The 1938 Resolution says nothing on the subject of gratuity pay in situations where work was actually performed on a holiday. The 1885 Resolution has been consistently construed to grant gratuity pay in addition to regular pay for holiday worked and the 1938 Resolution only repealed the 1885 Resolution to the extent that it may be inconsistent.

Plaintiff has been paid for his holiday work. He is now asking only for the gratuity pay granted him under the 1885 Resolution.

All of the circumstances, including the legislative history of the 1938 Resolution, indicate that Congress did not intend to eliminate the customary practice of granting gratuity pay for days worked on holidays occurring on a regular work day. Furthermore, the 1938 Resolution can be given the construction contended for by plaintiffs herein without doing violence to its language or creating an
50 inconsistency with the 1885 Act.

The fact that during this period the Secretary of the Navy, in accordance with a directive of the President, issued a directive that holidays, with the exception of Christmas, be considered as regular work days, would have nothing to do with the issue here. If the Government required per diem employees to work on holidays, it should pay for such services.

Plaintiffs are entitled to recover. Judgment will be suspended pending a report from the General Accounting Office as to the exact amount due each plaintiff.

It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

WHITAKER, *Judge,* dissenting:

I dissent for the reasons stated in *Kelly et al.,* v. *United States,* 119 C. Cls. 197; aff'd. 342 U.S. 193.

FINDINGS OF FACT

The court makes findings of fact, based upon the stipulation of the parties, the briefs, and argument of counsel, as follows:

1. At all times material hereto, plaintiff Bergh has been and is now a citizen of the United States of America.

2. During the period from January 1, 1945, to December 1, 1945, Bergh was regularly employed as a leading man, electric welder, in the Norfolk Naval Shipyard, Portsmouth, Virginia, and, as a per diem civilian employee of the Navy Department, his rate of pay was fixed by the Secretary of the Navy in accordance with the provisions of the Act of July 16, 1862, 12 Stat. 587, 34 U. S. C. sec. 505.

3. During the period from January 1, 1945, to December 1, 1945, Bergh was required to and did work on each of the following holidays:

January 1, 1945	New Year's Day
February 22, 1945	Washington's Birthday
May 30, 1945	Memorial Day
July 4, 1945	Fourth of July

On each of these holidays, Bergh worked 9½ hours and was paid for the work performed on these holidays 8 hours' straight
51 time and 1½ hours' overtime. On January 1, 1945, Bergh worked the night shift and was paid at the basic rate of pay of $1.57 per hour. On February 22, 1945, May 30, 1945, and July 4, 1945, Bergh worked the day shift and was paid at the basic rate of $1.51 per hour.

4. During the period from January 1, 1945, to December 1, 1945, Bergh was excused from working but was nevertheless paid 8 hours' straight time for the following holidays:

September 3, 1945	Labor Day
November 12, 1945	Armistice Day (November 11, 1945, falling on a Sunday)
November 22, 1945	Thanksgiving Day

For each of these holidays on which Bergh performed no work, Bergh, who was at those times on the day shift, was paid 8 hours' straight time at the rate of pay of $1.51 per hour.

5. Bergh resigned from his employment in the Norfolk Naval Shipyard on August 13, 1946, at which time he entered the military services of the United States. He was honorably discharged from the military service on February 5, 1948, and was re-employed in the Norfolk Naval Shipyard on February 16, 1948.

6. On March 10, 1952, Bergh submitted a claim to the Comptroller General of the United States for additional compensation for the work performed on January 1, 1945, February 22, 1945, May 30, 1945, and July 4, 1945. On March 28, 1952, the Comptroller General issued a settlement certificate in which he disallowed Bergh's claim and certified that no balance was due him from the United States. A true copy of such settlement certificate is attached to the petition herein as Exhibit No. 1.

7. Prior to the enactment of the Joint Resolution of June 29, 1938 (52 Stat. 1246), the statutes relating to holiday pay for per diem employees generally were as follows:

> That the employes of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to-wit: The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth
> 52 day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days (23 Stat. 516, Jan. 6, 1885).
>
> That all per diem employees of the Government on duty at Washington or elsewhere in the United States, shall be allowed the day of each year, which is celebrated as "Memorial" or "Declaration Day" and the fourth of July of each year, as holiday, and shall receive the same pay as on other days (24 Stat. 644, Feb. 23, 1887).
>
> That the first Monday of September of each year, being the day celebrated and known as Labor's Holiday, is hereby made a legal public holiday, to all intents and purposes, in the same manner as Christmas, the first day of January, the twenty-second day of February, the thirtieth day of May, and the fourth day of July are now made by public law holidays (28 Stat. 96, June 28, 1894).
>
> That the 11th day of November in each year, a day to be dedicated to the cause of world peace and to be hereafter celebrated and known as Armistice Day, is hereby made a legal public holiday to all intents and purposes and in the same manner as the 1st day of January, the 22d day of February, the 30th day of May, the 4th day of July, the first Monday of Sep-

tember, and Christmas Day are now made by law public holidays (52 Stat. 351, May 13, 1938).

8. The Joint Resolution of January 6, 1885, was initially construed by the Comptroller of the Treasury so as to deny an extra day's pay, at straight rates, called "gratuity" pay, to per diem employees who worked on a holiday. In a decision dated March 11, 1898 (4 Comp. Treas. 499), the following question from Major Dan C. Kingman, Corps of Engineers, was answered in the negative:

> (4) On all large works, it is frequently necessary to keep a certain number of per diem men at work on legal holidays to attend to the pumps, look after the steam machinery, take care of public animals, or for some unforeseen emergency work. In such cases would it be lawful and proper to allow these men an extra day's pay in order to put them on an equality with their fellows who do not work on the holiday and yet are paid full wages for it?

However, in a decision dated July 23, 1906, to the Secretary of the Navy, the Assistant Comptroller of the Treasury later
53 construed the above set forth Joint Resolution of January 6, 1885 (23 Stat. 516), to permit the payment of the regular per diem wage for work performed by first-class electrical machinist at the Naval Proving Grounds on a holiday, in addition to gratuity pay required by the Joint Resolution to be paid. In referring to said Joint Resolution of January 6, 1885 (23 Stat. 516), and the above set forth Joint Resolution of February 23, 1887 (24 Stat. 644), the opinion said:

> These statutes allow or grant to certain employees of the Government the holidays specified with regular pay. The pay given is not for service performed or labor performed, but is a gratuity. It is not intended that the employees shall perform any service for the pay given them by these joint resolutions. *The pay has no relation to work.* If the public interests require that these employes shall work on stated holidays and they do work, then if they receive only the pay given by the joint resolutions they have not been paid for their *labor*, but have received merely the gratuity which they were entitled to without working. They are, therefore, entitled to pay at the rate of their regular per diem pay for work on the holidays in addition to the gratuity pay given them by the statutes referred to; that is, to double the amount of their regular per diem pay when they work all day (13 Comp. Treas. 40).

On February 26, 1918, H. F. Wortham, Captain, Quartermaster Reserve Corps, requested an opinion of the Comptroller of the

Treasury as to whether per diem employees who worked on holidays should be paid gratuity pay plus time and one-half for the hours actually worked, as provided by an authorization of the Quartermaster General made with approval of the Secretary of War. In his reply of March 16, 1918 (24 Comp. Treas. 529) the Comptroller said:

> It has been held by this office that where, by reason of public necessity, per diem employees are required to perform services for the Government on any of the holidays specified in the Acts of Congress dated January 6, 1885 (23 Stat. 516); February 23, 1887 (24 Stat. 644); and June 28, 1894 (28 Stat. 96), they would be entitled, unless otherwise expressly provided, to double pay for such days, i.e., gratuity pay granted by Con-
> 54 gress and regular pay for services actually performed on said days. See 8 Comp. Dec. 322; 21 Comp. Dec. 571; 22 Comp. Dec. 405, and 24 Comp. Dec. 218.

On May 5, 1934, the Secretary of the Navy propounded a number of inquiries of the Comptroller General, some of which pertained to gratuity pay, and in this answer of May 19, 1934 (13 Comp. Gen. 370), the Comptroller General stated the opinion that gratuity pay in addition to the regular rate of pay should be given for work performed on any of the holidays mentioned in the Acts of January 6, 1885 (23 Stat. 516), February 23, 1887 (24 Stat. 644), and June 28, 1894 (28 Stat. 96).

9. Navy Regulations, 1896, Article 1574 (d) pertaining to pay of per diem workers provided:

> For work performed on Sundays or on legal holidays, the ordinary rate of pay, plus 50% additional shall be allowed.

Navy Regulations, 1900, Article 1574 (d) and Navy Regulations, 1905, Article 1600 (c) contain the same provisions quoted above. Navy Yard Order No. 853, dated August 16, 1910, stated, in part:

> * * * per diem employees paid from lump sum appropriation at Navy Yards, who are regularly required to work on Sundays and holidays, are entitled for work performed on national holidays to their regular rate of pay and in addition thereto gratuity pay.
>
> Laborers and mechanics who by reason of any emergency are required to work on national holidays are entitled to their regular rate of pay plus 50% additional, and in addition thereto to gratuity pay.

Navy Regulations and Naval Instructions, 1913, 382 (5) provided:

> For work performed on Sundays or on legal holidays by reason of an emergency, the ordinary rate of pay, with 50% additional, shall be allowed, and in addition thereto gratuity pay for the legal holidays.

Schedule of Wages for 1924, page 20, provided:

> For work on legal holidays not exceeding 8 hours performed under proper authority, the schedule rate of pay, plus
> 55 50% additional, shall be allowed, and, in addition thereto, gratuity pay for the legal holiday.
>
> For work in excess of 8 hours on Sundays or legal holidays performed by reason of extraordinary emergency, 50% additional to the Sunday or holiday rate of pay shall be allowed.

Schedule of Wages for 1925, page 20; Schedule of Wages for 1926, page 42; Schedule of Wages for 1927, page 43; Schedule of Wages for 1927, as amended, effective July 1, 1927, page 44; Schedule of Wages for 1928, page 41; Schedule of Wages for 1929, page 47; and Schedule of Wages revised to July 23, 1931, page 59, all contain the same provisions as that of the 1924 schedule quoted above.

Schedule of Wages revised to March 1, 1936, pages 55-56 provided:

> For work on legal holidays within the employee's regular tour of duty, the schedule rate of pay shall be allowed, and in addition thereto gratuity pay for the legal holiday.
>
> Gratuity pay shall be allowed for legal holidays not within the employee's regular tour of duty and upon which no work is performed.
>
> * * *
>
> For work on legal holidays, not exceeding 8 hours, when not a part of the employee's regular tour of duty, performed under proper authority, the schedule rate of pay, plus 50% additional, shall be allowed, and in addition thereto, gratuity pay for the legal holiday.
>
> For work in excess of the 8 hours on Sundays or legal holidays, when such days are not a part of the employee's regular tour of duty, performed by reason of an extraordinary emergency, 50% additional to the Sunday or holiday rate of pay, or 125% additional to the schedule rate of pay, shall be allowed.

10. Public Resolution No. 127 (52 Stat. 1246), enacted on June 29, 1938, provided as follows:

> That hereafter whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piecework basis are relieved or prevented from working *solely* because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the depart-
> 56 ments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.
>
> SEC. 2. The joint resolution of January 6, 1885 (U. S. C., title 5, sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed *to the extent of such inconsistency or conflict.*

11. The Secretary of the Navy was informed by the Comptroller General, in decision of July 6, 1938, A-94536, 18 Comp. Gen. 10, that gratuity pay for holidays was no longer a vested right of per diem employees but that such employees were then entitled to pay for holidays only under and subject to the conditions of the Joint Resolution. The Comptroller General further held in decision of August 19, 1938, A-97193, 18 Comp. Gen. 188, as follows:

> Hence regular per diem, per hour and piecework employees are entitled to their regular pay for holidays on which no work is performed only if and when they are "relieved or prevented from working solely because of the occurrence of" the holiday. If they are relieved or prevented from working on the holiday for any reason other than the occurrence of a holiday such as when the holiday occurs on a non-workday or within a period of furlough or leave of absence, no pay for the holiday as such is authorized. If such employees are required to work on a holiday occurring within their regular tour of duty, only one day's pay is authorized—payment of gratuity holiday pay in addition being no longer authorized. If the holiday occurs on a day outside the regular tour of duty of 40 hours per week and work is required on the holiday, the employee is not entitled to 2 days' pay, one for working and one for the holiday, but may be entitled to overtime pay for the day under administrative regulations at a rate not less than one and one-half times their regular pay.

12. Navy Department Circular Letter of August 17, 1938, based on the 1938 resolution and the Comptroller General's opinion A-94536, deleted the provision of the Schedule of Wages revised to March 1, 1936, quoted in finding 9 hereof and substituted therefor:

> For work on any day declared a holiday by Federal statute or Executive Order or any day on which the departments
> 57 and establishments of the Government are closed by Executive Order, within the employee's regular tour of duty, the schedule rate of pay shall be allowed.
>
> Whenever an employee is relieved or prevented from working solely because of the occurrence of any day declared a holiday by Federal statute or Executive Order, or any day on which the departments and establishments of the Government are closed by Executive Order, he shall receive the same pay for such days as for other days on which an ordinary day's work is performed.
>
> For work on any day declared a holiday by Federal statute or Executive Order or any day on which the departments and establishments of the Government are closed by Executive Order, not exceeding eight hours, when not a part of the employee's regular tour of duty, performed under proper authority, the schedule rate of pay plus 50% additional shall be allowed.
>
> For work in excess of eight hours on Sundays or on any day declared a holiday by Federal statute or Executive Order or any day on which the departments and establishments of the Government are closed by Executive Order, when such days are not a part of the employee's regular tour of duty, performed by reason of extraordinary emergency, 50% additional to the Sunday or holiday rate of pay, or 125% additional to the schedule rate of pay shall be allowed.

Schedule of Wages, effective November 18, 1940, page 63; Schedule of Wages, revised to November 30, 1943, page 29; and Schedule of Wages, revised to October 16, 1944, pages 21-22, restated the provisions of the Circular Letter of August 17, 1938 quoted above, with some minor variations in wording.

Navy Civilian Personnel Instructions, NCPI 250.7-12 and 250.7-13 of April 13, 1945, continued the substantive provisions of the Circular Letter of August 17, 1938.

NCPI 250 Amendment 2 of September 20, 1945 substituted for provisions originated in the Circular Letter of August 17, 1938 quoted above, the following:

> a. Per diem employees shall be allowed compensation at the rate of true time and one-half for work on a Sunday

or holiday falling outside the regular tour of duty, provided they have been in a pay status during the regular 40-hour tour of duty.

b. For work on a Sunday or holiday falling within the
58 regular 40-hour tour of duty, per diem employees are allowed the same rate of pay as for any other day within the regular tour of duty.

13. In recognition of the construction of the Comptroller General of the Joint Resolution of June 29, 1938, there were introduced into Congress several bills to restore holiday gratuity pay rights similar or in addition to those conferred by prior statutes upon per diem employees. None of such bills was enacted into law. The first such bill was House Joint Resolution 303, 76th Cong., 1st Sess., which was introduced by Mr. Darden and referred to the Committee on Civil Service May 24, 1939 (84 Cong. Rec. 6111), and read as follows:

> That Public Resolution numbered 127, Seventy-fifth Congress approved June 29, 1938 entitled "Joint Resolution providing compensation for certain employees" be amended by striking out all after the resolving clause and substituting in lieu thereof the following:
>
> "That hereafter whenever employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are granted a holiday by Executive Order, or whenever the departments and establishments of the Government are closed by Executive Order in observance of a public event, they shall receive the same pay for such days as on other days on which an ordinary day's work is performed and all Acts or parts of Acts repealed or modified by the Act of June 29, 1938 (Public Resolution No. 127, 75th Cong.) are hereby restored to full force and effect."

On May 30, 1939, Robert Ramspeck, Chairman, Committee on Civil Service, House of Representatives, requested a report of the Civil Service Commission regarding the proposed legislation. On October 31, 1939, the president of the Civil Service Commission, Harry B. Mitchell, replied, stating that:

> It will be seen, therefore, that the Joint Resolution of June 29, 1938, thus interpreted [by the Comptroller General] instead of conferring the additional benefits of pay for days declared holidays by Executive Order, may operate to deprive a per diem employee of the gratuity pay for *statutory holidays*, a benefit which for more than fifty years has been

regarded as in the nature of a vested right. This interpretation of the statute grants no additional pay to a per diem employee who is required to work on a statutory holiday
59 occurring within his regular tour of duty, while a per diem employee with exactly the same tour of duty who is not required to work receives exactly the same pay for the holiday. Further, the receipt of pay for statutory holidays upon which per diem employees are not required to work is dependent upon circumstances which may be purely fortuitous, such as the occurrence of a holiday upon an administrative non-work day, or within a period of furlough or leave without pay. In other words, if two per diem employees performing exactly the same work are assigned to different tours of duty, one including a statutory holiday, and the other excluding it, the employee assigned to the former tour will receive pay for the holiday, whereas the employee assigned to the latter tour will not, although neither employee is required to work on that day. Since H. J. Res. 303 will adjust any inequalities as between per diem employees themselves, the Commission believes that favorable consideration should be given to the bill.

The Bureau of the Budget has advised this office that the enactment of H. J. Res. 303 in its present form would not be in accord with the program of the President. The Bureau states, however, that there would be no objection to the enactment of legislation which would permit the payment of compensation to a regular per diem employee when absent from duty for any cause on a holiday occurring within the tour of duty.

In the 77th Cong., 1st Sess., there was introduced H. R. 1386, a bill to grant all employees of the United States Government equal rights and privileges with respect to all established national holidays. H. R. 1386, introduced by Mr. Darden and referred to the Committee on Public Buildings and Grounds on January 6, 1941 (87 Cong. Rec. 47), reads as follows:

> That all employees of the United States Government whose tour of duty requires them to work on any national holiday for any reason whatsoever be not deprived of the benefits of any such holiday as to gratuity pay as may be established by Congress.
>
> SEC. 2. Where and whenever a holiday falls during any employees' tour of duty, such as employees of Government power plants, Fire Department employees, telephone operators, guards and other maintenance workers who may be required to work on holidays, that such employees be either

granted extra compensation over and above the gratuity pay allowed by congressional action for all national holidays
60 or that the employees be granted time out for such work on any holiday, and during the week in which a holiday falls.

SEC. 3. Compensation for holiday work shall be at one and one-half times the regular rate of pay and shall be in addition to the gratuity pay allowed for holiday. Where time out is granted for holiday work in lieu of compensation, such time shall likewise be granted on the same basis as the overtime rate of pay.

SEC. 4. After the passage of this Act, it shall be unlawful to work any employee of the United States Government in excess of thirty-two hours a week in which a national holiday falls, and for which said employee shall receive pay for forty hours' work; except that the stipulations of section 3 of this Act shall be complied with.

On January 14, 1941, Robert Ramspeck, Chairman, Committee on Civil Service, transmitted a copy of H. R. 1386 to the Civil Service Commission and requested a report of the Commission's views regarding the proposed legislation. On July 21, 1941, the Acting President, Lucille Foster McMillin, Civil Service Commission, replied, recommending certain changes and favorable consideration of the bill and stating further that the Bureau of the Budget had advised that the enactment of H. R. 1386, either in its present form, or in the amended form suggested by the Civil Service Commission, would not be in accord with the program of the President, but that there would be no objection to the enactment of legislation which would permit the payment of compensation to a regular per diem employee when absent from duty for any cause on a holiday occurring within his tour of duty.

There was introduced in the 77th Congress, 1st Session, S. 1930 (introduced September 24, 1941 by Senator Byrd and referred to the Senate Committee on Naval Affairs, 87 Cong. Rec. 7526) and H. R. 6222 (introduced December 15, 1941, by Mr. O'Toole and referred to the House Committee on Civil Service, 87 Cong. Rev. 9750). S. 1930 and H. R. 6222 both read as follows:

That the first section of the joint resolution entitled "Joint Resolution providing compensation for certain employees," approved June 29, 1938, is amended by inserting before the period at the end thereof a colon and the following:

"*Provided,* That whenever any employee of the Federal Government who is employed at any Navy yard or naval station is required to work on any such holiday or day

61 on which the departments and establishments of the Government are closed by Executive order, he shall be allowed compensatory time off on one other workday within the week following such holiday or, in lieu thereof, be paid one additional day's pay at his regular rate."

In the 79th Congress, 2d Sess., S. 1679, "A bill to authorize additional compensation for work performed on a legal holiday by employees of the Government Printing Office," was passed by the Senate on March 5, 1946 (92 Cong. Rec. 1919 and provided as follows:

> That employees of the Government Printing Office who are required to work on days designated by Federal statute or Executive order as holidays are entitled, for the time worked, to their regular rate of compensation in addition to the regular pay for the holiday.

S. 1679 was not passed by the House.

14. In the 77th Congress, 1st Session, there was introduced H. R. 1642, a proposed amendment to Public Resolution No. 127, to include per diem employees of the District of Columbia Government and to leave the substantive provisions of the Resolution unchanged. H. R. 1642 passed the House on June 2, 1941 (87 Cong. Rec. 4624) after the construction placed upon Public Resolution No. 127 by the Comptroller General had become well known and after other bills such as H. J. Res. 303, 76th Congress had been introduced to change the substantive effect of the Public Resolution as construed by the Comptroller General. H. R. 1642 was not passed by the Senate.

15. The Secretary of the Navy issued the following directives providing for wartime holiday work by Navy employees and disciplinary action against employees failing to report for work on holidays:

October 29 1942 ALNAVSTA 291330

Because of the necessity for expediting work due to war emergency 11 November Armistice Day X will be a work day for all employees of the Navy Department X Marine Corps and Coast Guard and their field services paragraph employees will receive their regular compensation for work performed
62 on Armistice Day X except that existing overtime provisions apply X per annum employees who are directed to report for work on the holiday and do not report for work on that day shall not be paid for the holiday X per diem employees who are directed to work on the holiday and do not report for work on that day shall be marked out and appropriate discipli-

nary cognizance taken of failure to report for duty paragraph in accordance decision Comp. Gen. 2 April no charge shall be made against the annual or sick leave accounts of per annum and per diem employees for absence on the holiday whether with or without authority.

August 17 1943 ALNAVSTA 172309

In accordance with a directive of the President 12 May that necessity for maintaining maximum output in government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should X with exception of Christmas be considered as regular work days for duration of war X Labor's holiday 6 September and all succeeding holidays X with exception of Christmas will be work days for all employees of the Navy Department X Headquarters US Marine Corps and Headquarters US Coast Guard and their field services X instructions regarding Armistice day in ALNAVSTA 291330 October 1942 apply.

16. On May 12, 1943, the following White House Memorandum was issued:

To the Heads of Executive Departments and Agencies
Subject: Observance of holidays during the war period

The necessity for maintaining maximum output in Government activities throughout the war period requires that days normally observed by the departments and agencies as
63 holidays should, with the exception of Christmas, be considered as regular work days for the duration of the war.

By direction of the President:

(S.) WM. H. MCREYNOLDS,

Administrative Assistant to the President.

This Presidential directive was reaffirmed on December 17, 1943, by Mr. W. H. McReynolds, Administrative Assistant to the President, in the following statement addressed to the heads of the Federal Departments and Agencies:

On May 13, 1943, by direction of the President, I issued the following statement concerning the observation of holidays:

"The necessity for maintaining maximum output in Government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should, with exception of Christmas, be considered as regular work days for the duration of the war."

This policy is consistent with the attitude of the Government toward maintenance of full production in war industry on Holidays other than Christmas.

The President has reaffirmed his desire previously expressed on this matter.

There is full realization of the long hours which Federal employees are continuously working in the interest of the war effort and of the fact that holiday work is performed by Federal employees without additional compensation. The policy with respect to work on holidays will be reconsidered at the earliest possible moment that progress in the war will permit.

Christmas Day and Christmas Eve have traditionally been important family days in the life of this Nation. The President has indicated that the heads of departments and agencies may, in their discretion, permit offices or establishments to be closed or any employees whose services can be spared to leave their work not earlier than two hours in advance of the usual closing time on Christmas Eve, December 24.

With respect to forthcoming holidays, other than Christmas, you are advised that the President expects them to be observed as regular working days.

Accordingly, per annum and per diem employees of the United States were required to work on all succeeding holidays except Christmas until August 23, 1945, when the eight paid holidays were restored by White House Memorandum.

64 17. The Federal Employees Pay Act of 1945 (59 Stat. 295), effective July 1, 1945, authorized holiday premium pay at the rate of time and one-half "in lieu of their regular pay" when graded employees were required to work on a holiday. This law thus created an inequity between the two groups of employeees—graded and ungraded. With a view to correcting this inequity, the Secretary of the Navy and the Secretary of War in a joint letter to the Comptroller General asked whether the heads of the two departments by administrative order could authorize holiday premium pay for ungraded employees required to work on holidays. The Comptroller General ruled in the affirmative on February 7, 1946 (25 Comp. Gen. 584). By official order dated February 19, 1946 (Alnavsta No. 11), the Secretary of the Navy directed that all ungraded employees required to work on a holiday falling within the regular workweek be paid for such work at the rate of time and one-half in lieu of their regular rate. Bergh was an ungraded employee within the meaning of the Federal Employees Pay Act of 1945.

18. On September 9, 1942, the President, in Executive Order No.

9240, 7 F. R. 7159, limited the holiday pay of persons employed in war work, effective October 1, 1942, as follows:

Whereas many labor organizations have already adopted the patriotic policy of waiving double time wage compensation or other premium pay for work on Saturday, Sunday and holidays, as such, for the duration of the war; and

Whereas it is desirable and necessary in the prosecution of the war, and to insure uniformity and fair treatment for those labor organizations, employers and employees who are conforming to such wage policies that this principle be universally adopted.

Now, therefore, by virtue of the authority vested in me by the Constitution and the statutes, as President of the United States and as Commander in Chief of the Army and Navy, it is hereby ordered:

I. That the following principles and regulations shall apply for the duration of the war to the payment of premium and overtime wage compensation on all work relating to the prosecution of the war:

A. No premium wage or extra compensation shall be paid to any employee in the United States, its territories or possessions, for work on Saturday or Sunday except where
65 such work is performed by the employee on the sixth or seventh day worked in his regularly scheduled workweek and as hereinafter provided.

(1) Where because of emergency conditions an employee is required to work for seven consecutive days in any regularly scheduled workweek a premium wage of double time compensation shall be paid for work on the seventh day.

(2) Where required by the provisions of law or employment contracts, not more than time and one-half wage compensation shall be paid for work in excess of eight hours in any day or forty hours in any workweek or for work performed on the sixth day worked in any regularly scheduled workweek.

B. No premium wage or extra compensation shall be paid for work on customary holidays except that time and one-half wage compensation shall be paid for work performed on any of the following holidays only:

New Year's Day
Fourth of July
Labor Day
Thanksgiving Day
Christmas Day

and either Memorial Day or one other such holiday of greater local importance.

II. All Federal departments and agencies shall conform the provisions in all existing and future contracts negotiated, executed, or supervised by them to the policies of this order. All such departments and agencies shall immediately open negotiations to alter provisions in existing contracts to conform them to the requirements of this order.

III. Nothing in this order shall be construed as requiring a modification of the principle that every employee should have at least one day of rest in every seven days. The continuous operation of plants and machines in prosecuting the war does not require that employees should work seven consecutive days.

IV. Nothing herein shall be construed as superseding or in conflict with the provisions of the statutes prescribing the compensation, hours of work and other conditions of employment of employees of the United States.

V. All Federal departments and agencies affected by this order shall refer to the Secretary of Labor for determination questions of interpretation and application arising hereunder.

* * * * *

66 Interpretative Bulletin No. 1 of Executive Order 9240, U. S. Department of Labor, Office of the Secretary, dated February 17, 1943, contained the following provisions:

The Secretary of Labor, pursuant to Section V, is authorized and directed to interpret the provisions of Executive Order 9240. This bulletin is intended to set forth the Secretary's interpretations. The Order was designed (1) to facilitate 'round-the-clock war production, (2) to discourage absenteeism found to have resulted from the practice of paying premium rates for particular days as such, and (3) to assure, in the interest of efficiency and health, observance of the principle that workers should have at least one day of rest in each week. The interpretations embodied in this bulletin have been made after a number of months of experience under the Order and are believed to be in accord with its purpose.

* * * * *

II. COVERAGE

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* * * Agricultural workers and *employees of Federal or State Government, and political subdivisions thereof, are not subject to the Order.*

* * * * *

VIII. Holidays

15. Paragraph I B of the Order has two requirements: (1) It requires time and one-half for work on the 6 holidays enumerated in the Order, and (2) it forbids payment of any premium wage or extra compensation for work on any other holidays as such. A choice is afforded between Memorial Day and any other holiday of greater local importance. Failure to select a substitute holiday leaves Memorial Day as the sixth holiday under the Order. The holiday chosen as a substitute for Memorial Day need not be the same holiday each year but only 6 holidays may be paid for at premium rates in the 12-month period beginning October first.

16. The Order requires that time and one-half compensation be paid for work on designated holidays but forbids payment in excess of time and one-half. Thus, if the wages of an employee include compensation for a holiday although not worked, the additional amount which must be paid under the Order for work performed on that holiday is limited to such amount
67 as brings the total compensation for the day to time and one-half.

17. Compensation for work performed on a holiday should be computed at one and one-half times the straight-time rate paid for work on that day or one and one-half times the average straight-time hourly rate for the workweek, whichever is the customary method of computing overtime compensation. The employer's records should indicate which method is adopted.

18. For purposes of computing the seventh day of work in a workweek under the Order, the designated holidays must be included in the count whether or not work is performed on such days. An idle holiday should be included in computing the sixth day worked in the workweek unless the employment contract specifies otherwise.

19. Insofar as the Order requires payment of time and one-half for work on the designated holidays, it means payment of time and one-half for the hours worked on the calendar holiday, namely, hours worked between midnight at the beginning of the holiday and midnight at the close of the holiday.

20. However, in order to give all employees equal benefit of the holiday, it is permissible to compensate employees at time and one-half for all hours worked on a shift, some part of which cuts across the calendar holiday. It is not permissible to pay the time and one-half holiday rate for more than one shift, in a situation in which the employee works two shifts, both of which cut across the calendar holiday. However, employees must be paid time and one-half for at least all the hours worked on the calendar holiday.

21. If one of the designated holidays falls on Sunday, either Sunday or Monday may be observed as the holiday, but not both.

22. There is no provision in the Order relating to compensation on holidays not worked.

* * * * *

Because its Zone Pay Standards were substantially identical to the provisions of Executive Order 9240 the shipbuilding and ship-repair industry was exempted from the terms of Executive Order 9240 (by order of Secretary of Labor, dated February 25, 1943). By these Zone Standards, employees of the shipbuilding and ship-repair industry were paid time and one-half for work performed on specified holidays during the period from July 19, 1952, to October 6, 1945.

68 19. The wage and working conditions of Bergh and a first-class electric welder employed by the largest privately owned shipyard in the Norfolk, Va., area, the Newport News Shipbuilding and Dry Dock Company, Newport News, Virginia, on January 1, 1945, were as follows:

Bergh (Navy):	Newport News Shipbuilding & Welder Dry Dock Co.:
1. Rate of pay:	
(a) Night shift, $1.57 per hour.	Unknown.
(b) Day shift, $1.51 per hour.	
(c) Holiday pay, same as above.	1½ regular rate on 6 specified holidays per year if worked.
2. Vacation: 26 days per year.	One week per year for employees with 2 years continuous service. Two weeks per year for employees with 10 years continuous service.
3. Sick leave: 15 days per year.	None.
4. Paid holidays: 8 days per year.	None.
5. Retirement: Civil Service.	Social Security.
6. Bonus plan: None.	None.
7. Hospitalization (in addition to on-the-job injury): None.	Employee-company participation.
8. Insurance (in addition to on-the-job injury): None.	Employee-company participation.

The holidays worked and pay received therefor by production employees of the Newport News Shipbuilding and Dry Dock Company during 1945 were as follows:

January 1, 1945, Holiday worked, pay and ½ received.
February 22, 1945, Holiday worked, straight pay received.

(George Washington's Birthday not a holiday specified in collective bargaining agreement or Zone Standards)

May 30, 1945, Holiday worked, pay and ½ received.
July 4, 1945, Holiday worked, pay and ½ received.
69-70 September 3, 1945, Holiday not worked, no pay received.
November 12, 1945, Holiday worked, straight pay received.

(Armistice Day not a holiday specified in collective bargaining agreement)

November 22, 1945, Holiday not worked, no pay received.
December 25, 1945, Holiday not worked, no pay received.

20. No other action has been taken on this claim in Congress or by any of the Departments; no person other than Bergh is the owner thereof or interested therein; no assignment or transfer of this claim or any part thereof, or interest therein has been made.

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiffs are entitled to recover.

Entry of judgment is suspended pending the filing of a report by the General Accounting Office showing the amount due each plaintiff in accordance with this decision.

71-72 In the United States Court of Claims

No. 269-52

Alfred C. Bergh, et al.

v.

The United States

Order re Judgment—November 8, 1955

On July 12, 1955, the court rendered an opinion together with findings of fact holding that plaintiffs were entitled to recover but suspended the entry of judgment pending the filing of a report by

the General Accounting Office showing the amounts due each plaintiff.

On October 5, 1955, said report by the General Accounting Office was filed stating that there is due plaintiffs the amounts set forth below and further stating that as to plaintiff Harry J. Novotney, Jr. (4) there is no sum due.

NOW, THEREFORE, IT IS ORDERED this eighth day of November, 1955, that judgment be and the same hereby is entered for the following named plaintiffs and in the following amounts:

Alfred C. Bergh (1), forty-eight dollars and eighty cents ($48.80)

Joe Frank Bryson (2), thirty dollars and twenty-four cents ($30.24)

James A. Cates (3), fifty-one dollars and twenty cents ($51.20)

Glenn Vockrodt (5), twenty-one dollars and twenty-eight cents ($21.28).

IT IS FURTHER ORDERED that the petition as to plaintiff
73 Harry J. Novotney, Jr. (4) is dismissed.

BY THE COURT
(S) MARVIN JONES,
Chief Judge.

74 Clerk's Certificate to foregoing transcript omitted in printing.

75 SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 9th, 1955.

EARL WARREN,
Chief Justice of the United States.

Dated this 7th day of October, 1955.

76 SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 23, 1956

The petition herein for a writ of certiorari to the United States Court of Claims is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 376828 1027